SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 527

THE UNITED STATES, APPELLANT

vs.

HARRIET ROGERS FLANNERY AND J. ROGERS FLANNERY, EXECUTORS OF THE ESTATE OF JAMES J. FLANNERY, DECEASED

APPEAL FROM THE COURT OF CLAIMS.

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1 IN COURT OF CLAIMS OF THE UNITED STATES

HARRIET ROGERS FLANNERY AND J. ROGERS FLANNERY, Executors of the Estate of James J. Flannery, deceased,

vs.

THE UNITED STATES.

No. C–1080.

I. Petition. Filed October 8, 1923

The claimants respectfully represent:

I. The claimants are the executors of the estate of James J. Flannery, late of Pittsburgh, Pennsylvania, and file herewith a duly authenticated copy of the record of their appointment.

II. On March 1, 1913, the said James J. Flannery, now deceased, was the owner of 473 shares of the capital stock of the Flannery Bolt Company, acquired by him before March 1, 1913, the fair market price and value of which on March 1, 1913, was $275 a share, totaling $130,075. James J. Flannery sold said stock,
2 229 shares October 29, 1919; 99 shares October 30, 1919; and 75 shares October 31, 1919, all for $225 a share, receiving for said 473 shares the total sum of $106,425.

III. The Revenue Act of 1918, which was in effect during the year 1919, provided in part as follows:

> "Sec. 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—
>
> "(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; * * *"

Article 1561 of Regulations 45 promulgated by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury April 16, 1919, pursuant to the provisions of the Revenue Act of 1918 provided that:

> "For the purpose of ascertaining the gain or loss from the sale or exchange of property the basis is (a) its fair market price or value as of March 1, 1913, if acquired prior thereto, or (b), if acquired on or after that date, its cost or its approved inventory value. * * *"

This regulation in words and figures as aforesaid was in force when the return was made for James J. Flannery, deceased, for the taxable year 1919, as described in the next paragraph hereof.

IV. Said James J. Flannery died March 6, 1920. On or about April 12, 1920, a return of his income for the year 1919 was
3 filed pursuant to law by these executors, and in filing such return a loss was taken of $23,650, the difference between the fair market price and value on March 1, 1913, and the actual price received for said stock of the Flannery Bolt Company, and the same

was deducted in computing the net income of said taxpayer, all pursuant to said law and regulations.

V. By Treasury Decision 3206 promulgated July 28, 1921, by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, Article 1561 of Regulations 45 was amended to read as follows:

> "ART. 1561. Basis for determining gain or loss from sale.—For the purpose of ascertaining the gain or loss from the sale or exchange of property the basis is the cost of such property, or if acquired on or after March 1, 1913, its cost or its approved inventory value. But in the case of property acquired before March 1, 1913, when its fair market value as of that date is in excess of its cost, the gain which is taxable is the excess of the amount realized therefor over such fair market value. Also in the case of property acquired before March 1, 1913, when its fair market value as of that date is lower than its cost, the deductible loss is the excess of such fair market value over the amount realized therefor. No gain or loss is recognized in the case of property sold or exchanged (a) at more than cost but at less than its fair market value as of March 1, 1913, or (b) at less than cost but at more than its fair market value as of March 1, 1913. * * *"

The petitioners contend that this amendment to Article 1561 is inconsistent with the Revenue Act of 1918 and is unlawful and void and that even if said regulation were lawful it is not lawfully to be applied retroactively to the return of the income of James
4 J. Flannery, deceased, for the year 1919, but the taxation of such income must be governed by the statute and lawful regulations in effect when the loss was sustained and when the return was made.

VI. On or about June 2, 1923, the Collector of Internal Revenue at Pittsburgh, Pennsylvania, made demand for the payment of additional taxes for the year 1919 totaling $12,875.24, of which additional assessment $9,046.98 was attributable to the disallowance of the said loss taken on the sale of the Flannery Bolt Company stock by the Commissioner of Internal Revenue, upon the authority of said amendment to Article 1561, Regulations 45, applied retroactively. These executors paid the amount so demanded under duress and with protest on June 11, 1923, and the same was duly paid into the United States Treasury. On or about July 13, 1923, these executors filed a claim for refund of said sum of $9,046.98, and the same was rejected by the Commissioner of Internal Revenue on or about September 19, 1923.

VII. No part of said sum of $9,046.98 so erroneously collected by the United States has been repaid to these executors. They have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government. They

are the sole and absolute owners of the claim herein presented. They have made no transfer or assignment of said claim or any part thereof and they are justly entitled to the amount claimed herein from the United States after allowing all just credits and set-offs.

5 VIII. Under Section 1324 of the Revenue Act of 1921 the claimants may be allowed interest at the rate of 6 per cent per annum on said sum of $9,046.98 from June 11, 1923, the date of payment under protest.

IX. The claimants, therefore, pray judgment in their favor against the United States in the sum of $9,046.98, with interest thereon at 6 per cent per annum from June 11, 1923.

HARRIET ROGERS FLANNERY and
J. ROGERS FLANNERY,
Executors of the Estate of
James J. Flannery,
By EDWARD B. BURLING.

COVINGTON, BURLING & RUBLEE,
Attorneys for Claimants.

(Jurat showing the foregoing was duly sworn to by Edward B. Burling, omitted in printing.)

6 *II. General traverse. Filed December 8, 1923*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Argument and submission of case

On May 5, 1924, this case was argued and submitted on merits by Mr. Edward B. Burling, for plaintiffs, and by Mr. Roscoe R. Koch, for defendant.

7 *IV. Findings of fact, conclusion of law and opinion of the Court by Campbell, Ch. J. Entered May 19, 1924*

This case having been heard by the Court of Claims upon a stipulation of the facts made on the part of the plaintiff by their attorneys of record in this case, and on behalf of the Government by Mr. Robert H. Lovett, Assistant Attorney General, the court adopts the stipulation of facts which is set out below as its

FINDINGS OF FACTS

I

The plaintiffs, Harriet Rogers Flannery and J. Rogers Flannery, are the executors of the estate of James J. Flannery, deceased.

II

During his lifetime the said James J. Flannery was the owner of 423 shares of the capital stock of the Flannery Bolt Co. acquired by him before March 1, 1913, at a price of less than $225 a share. The fair market price and value of said stock on March 1, 1913, was $275 a share, totaling $116,325. James J. Flannery sold said stock October 29 to 31, 1919, for $225 a share, receiving for said 423 shares the total sum of $95,175.

III

Article 1561 of Regulation 45 promulgated by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury April 16, 1919, pursuant to the provisions of the revenue act of 1918 (Treasury Decision 2831), provided:

"For the purpose of ascertaining the gain or loss from the sale or exchange of property the basis is (*a*) its fair market price or value as of March 1, 1913, if acquired prior thereto, or (*b*) if acquired on or after that date, its cost or its approved inventory value. * * *"

This regulation in words and figures as aforesaid was in force until July 28, 1921.

8 IV

James J. Flannery died March 6, 1920. On or about April 12, 1920, a return of his income for the year 1919 was filed by his executors. In filing such return a loss was claimed based on the difference between the fair market price and value on March 1, 1913, of said stock in the Flannery Bolt Co. and the actual price received for the same in 1919 by said James J. Flannery. The loss so claimed was deducted in said return in computing the net income of said taxpayer.

V

By Treasury Decision 3206, promulgated July 28, 1921, by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, article 1561 of Regulations 45 was amended to read as follows:

"ARTICLE 1561. *Basis for determining gain or loss from sale.*— For the purpose of ascertaining the gain or loss from the sale or exchange of property the basis is the cost of such property, or if acquired on or after March 1, 1913, its cost or its approved inventory value. But in the case of property acquired before March 1, 1913, when its fair market value as of that date is in excess of its cost, the gain which is taxable is the excess of the amount realized therefor over such fair market value. Also in the case of property acquired before March 1, 1913, when its fair market value as of that date is lower than its cost, the deductible loss is the excess of such fair market value over the amount realized therefor. No gain or

loss is recognized in the case of property sold or exchanged (*a*) at more than cost but at less than its fair market value as of March 1, 1913, or (*b*) at less than cost but at more than its fair market value as of March 1, 1913. * * *"

VI

On or about June 2, 1923, the collector of internal revenue at Pittsburg, Pa., made demand for the payment of additional taxes on the income of James J. Flannery for the year 1919 totaling $12,875.24, of which additional assessment $7,440.67 was attributable to the disallowance by the Commissioner of Internal Revenue of the loss taken on the sale of the said 423 shares of Flannery Bolt Co. stock, upon the authority of said amendment to article 1561, Regulations 45. The plaintiff executors paid the amount so demanded under duress and with protest on June 11, 1923. On or about July 13, 1923, these executors filed a claim for refund, and the same was rejected by the Commissioner of Internal Revenue on or about September 19, 1923.

VII

No part of said sum of $7,440.67, based on the disallowance of the loss claimed on the sale of 423 shares of Flannery Bolt Co. stock has been repaid to the plaintiff executors. They have at all times borne true allegiance to the Government of the United
9 States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government. They are the sole and absolute owners of the claim. They have made no transfer or assignment of said claim or any part thereof.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides as a conclusion of law, that the plaintiffs are entitled to recover the sum of $7,440.67, with interest thereon at the rate of 6 per cent per annum from June 11, 1923.

It is therefore adjudged and ordered by the court that the plaintiffs recover of and from the United States the sum of seven thousand four hundred and forty dollars and sixty-seven cents ($4,440.67), with interest thereon at the rate of 6 per cent per annum from June 11, 1923.

OPINION

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

James J. Flannery was the owner of 423 shares of the capital stock of the Flannery Bolt Co., acquired by him prior to March 1, 1913, at a price less than its fair market price and value was on March 1, 1913, and also less than he sold the same shares for in

October, 1919. The fair market price and value of these 423 shares on March 1, 1913, was $275 per share, making a total value of $116,325. He sold them in October, 1919, for $225 per share, receiving therefor a total sum of $95,175. The difference between the values at these two dates was a loss of $21,150. As between the original cost of the shares purchased prior to March 1, 1913, and the price received upon their sale after March 1, 1913, there was no loss.

James J. Flannery died March 6, 1920. Shortly thereafter the executors of his estate filed a return of his income for 1919, and upon this return claimed a loss based on the difference between the fair market price and value on March 1, 1913, of the stock already mentioned and the price received therefor upon its sale in October, 1919. This claimed loss was deducted in the return in computing the net income of the decedent. Thereafter, on or about June 2, 1923, the collector of internal revenue made demand upon the executors for additional taxes on the income of James J. Flannery for the year 1919, of which additional assessment $7,440.67 was attributable to the disallowance by the Commissioner of Internal Revenue of the loss on the sale of the 423 shares of stock in the Flannery Bolt Co. The additional taxes so demanded were paid by the executors under protest and duress, and on or about July 13, 1923, they duly filed with the commissioner a claim for refund which he disallowed. This suit seeks a recovery of the sum of $7,440.67, based on the disallowance of the claimed loss in the stock transaction.

The question for decision is whether under the revenue act of 1918 (40 Stat. 1057) the taxpayer in computing his net income for the year 1919 can make a deduction therefrom as for a loss sustained during the taxable year of the difference between the fair market price or value of certain corporate stock on March 1, 1913, and the price at which it was sold during 1919, this selling price being less than its value on March 1, 1913, but more than the price at which it was acquired, and the stock having been acquired before March 1, 1913.

Section 210 of the act imposes upon "the net income" of every individual a stated normal tax for the calendar year 1918, and for each year thereafter a lesser rate. Section 212 defines "net income" of an individual as meaning the gross income as defined in section 213, less the deductions allowed by section 214.

Section 213 declares what the term "gross income" includes and also provides that the term shall not include certain designated "items, which shall be exempt from taxation under this title."

Section 214, under the heading "Deduction allowed," provides that in computing net income there shall be allowed "as deductions" a number of items listed as "(1) business expenses, (2) interest on certain indebtedness, (3) taxes paid.

"(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise if incurred in trade or business.

"(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise if incurred in any transaction entered into for profit, though not connected with the trade or business."

There are a number of other authorized deductions.

The act anticipated the question as to what are "losses" that are thus authorized to be deducted because it prescribes a "basis for determining gain or loss," and provides:

"SECTION 202 (a). That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—

"(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

"(2) In the case of property acquired on or after that date, the cost thereof * * *.

In interpreting these provisions it is a cardinal rule that the intention of Congress be given effect. Where the statute is expressed in plain and unambiguous terms, Congress should be intended to mean what they have plainly expressed. Chief Justice Marshall in *United States* v. *Fisher*, 2 Cranch 358, 386, said: "Where the intent is plain nothing is left to construction." In *St. Paul R. R. Co.* v. *Phelps*, 137 U. S. 528, 536, it is said that where a statute is clear and free from all ambiguity, the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the Government, even though it may be the settled policy of a department. In *Insurance Co.* v. *Ritchie*, 5 Wall. 541, 545, the court say that when terms are unambiguous we may not speculate on probabilities of intention. And in the *State Tonnage Tax Cases*, 12 Wall. 204, 217, it is said: "Legislative enactments, where the language is unambiguous, can not be changed by construction, nor can the language be divested of its plain and obvious meaning." See *Crawford* v. *Brooks*, 195 U. S. 176, 189; *Franklin Sugar Co.* v. *United States*, 202 U. S. 580, 582; *White* v. *United States*, 191 U. S. 545, 551.

It is a primary and general rule of statutory construction that the intent of the lawmaker is to be found in the language
11 that he has used. *See Goldenberg Case*, 168 U. S. 95, 102.

In *Bates Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 33, the following language is adopted: "It is not only the safer course to adhere to the words of a statute construed in their ordinary import, instead of entering into any inquiry as to the supposed intention of Congress, but it is the imperative duty of the court to do so." See *Lake County* v. *Rollins*, 130 U. S. 662, 670. Another familiar rule is that the statute must be construed as a whole. Its clauses are not to be segregated, but every part is to be construed with reference to every other part. See *Blair* v. *Chicago*, 201 U. S. 400, 463; *Market Co.* v. *Hoffman*, 101 U. S. 112, 115; *Pollard* v. *Bailey*, 20 Wall. 520, 525. These rules are the more applicable when it becomes the duty of a court to construe a taxing statute because such

a statute directly concerns the individual citizen as well as others, and the popular or received import of its words should furnish the general rule of its interpretation to the end that its provisions may be the better understood by those who must pay the taxes which it imposes. See *Maillard* v. *Lawrence*, 16 How. 251, 261.

In the revenue act of 1918 Congress was imposing a tax on the net income of the individual, among others, and defined gross income. It provided that in computing this taxable net income there should be allowed certain "deductions." These deductions included losses sustained during the taxable year if incurred in trade or business, of if incurred in any transaction entered into for profit though not connected with trade or business. If the question of the meaning of these deductible losses were left to section 214 alone its solution would be more difficult, but it was not permitted to rest in such uncertainty. By section 202 (*a*) a basis is established for the purpose of ascertaining the loss sustained from the sale of property, and in the case of property acquired before March 1, 1913, this basis is the fair market price or value of such property as of that date. With this value found and the sale price fixed, the loss sustained, if any, is the difference between these amounts. The subject matter of section 214 is the ascertainment of net income less certain authorized deductions. Many of these deductions are allowable only because Congress authorized them, and what deductions should be allowed is plainly a matter of legislative discretion.

The present case has to do with losses sustained, and the loss which Congress authorized to be deducted was a loss measured by the difference between the price stated at one time and another time. Manifestly the meaning of losses sustained as the words appear in section 214 is not to be determined independently of other parts of the act. Even a technical word is not construed technically where otherwise defined in the statute itself. See *Pirie* v. *Chicago Title Co.*, 182 U. S. 438, 443. Congress could have omitted the basis for determining loss, but it did not do that, and inserted section 202 instead. The losses sustained which are authorized to be deducted are losses ascertained as the act requires. It thus defines what are deductible losses. They are not required to be such as could arise if the property were sold for less than it cost. Congress could have required that such a loss be shown, but it did otherwise. It carefully distinguished between "property acquired before March 1, 1913," and property acquired on or after
12 that date. As to the former, the price or value as of March 1, 1913, governs, and as to the latter, "the cost thereof" governs. The first of these distinctions is wiped out if the cost prior to March 1 be required, and the second clause is useless if the original cost of the property must in every case be used in ascertaining the deductible loss.

A fact not to be lost sight of is that Congress has authorized deductions in computing the net income and that the statutory rule for ascertaining the loss sustained is a prescribed method of finding

these authorized deductions. This statutory rule as applicable to property acquired before March 1 does not purport to show what is called in defendant's brief an "actual" loss, by which is meant a loss based on the original cost and selling price; but as applied to property acquired on or after March 1, 1913, the statute does contemplate an actual loss before it is properly deductible. Differently expressed, the statute adopts a more or less arbitrary basis for ascertaining a "loss sustained" on property acquired before March 1, 1913, and sold after the passage of the act of 1918, and it was competent for Congress to adopt this basis and authorize the resultant deduction. Speaking for the court, Mr. Justice Harlan, in *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 36, said: "In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action, based upon some supposed policy of Congress." We think it the duty of this court to give effect to the language of the enactment.

Upon the question under consideration we find no material difference between the revenue act of 1918 and the two prior enactments of 1916 and 1917, 39 Stat. 756; 39 Stat. 1000, and the view we have taken is in keeping with the regulations of the Treasury (Treas. Dec. 2831) in force until July 28, 1921. (See Treasury Decision 3206.) It is urged, however, that the cases of *Goodrich* v. *Edwards*, 255 U. S. 527, and *Walsh* v. *Brewster*, 255 U. S. 536, are decisive of the question. These cases deal with the question of "gain" in the act of 1916. They do not discuss or decide whether a loss claimed and ascertained as in this case is a proper deduction in computing net income of the individual under the revenue act of 1918. That the right to tax income and the right to authorize deductions are governed by different considerations is manifest. Our conclusion is that the plaintiffs are entitled to recover. And it is so ordered.

HAY, *Judge;* DOWNEY, *Judge*, and BOOTH, *Judge*, concur.

13 *V. Judgment*

At a Court of Claims held in the city of Washington on the nineteenth day of May, A. D. 1924, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiffs, and do order and adjudge that the plaintiffs, as aforesaid, are entitled to recover and shall have and recover of and from the United States the sum of seven thousand four hundred and forty dollars and sixty-seven cents ($7,440.67), with interest thereon at the rate of 6 per cent per annum from June 11, 1923.

By the Court.

VI. Petition for and order allowing appeal filed June 27, 1924

From the judgment rendered in the above-entitled cause on the 19th day of May, 1924, in favor of claimants, the defendants, by

their Attorney General, on the 27th day of June, 1924, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

Ordered:

That the above application for appeal be allowed as prayed for.
June 30, 1924.

By the Court.

14 In Court of Claims

(Title omitted.)

Clerk's certificate

I, F. C. Kleinschmidt, assistant clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Campbell, Ch. J.; of the judgment of the court; of the defendant's application for an appeal and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this seventh day of July, A. D. 1924.

[SEAL.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 30,492. Court of Claims. Term No. 527. The United States, appellant, vs. Harriet Rogers Flannery and J. Rogers Flannery, executors of the estate of James J. Flannery, deceased. Filed July 9th, 1924. File No. 30,492.

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